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BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of	)	
	)	
Implementation of Sections of	)	
the Cable Television Consumer	)	MM Docket No. 92-266
Protection and Competition Act	)	
of 1992	)	
	)	
Rate Regulation	)	

REPLY COMMENTS OF TIME WARNER CABLE IN RESPONSE TO THE FIFTH NOTICE OF PROPOSED RULEMAKING

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SUMMARY

The comments filed in response to the Fifth Notice confirm that the current going forward approach effectively has frozen the introduction of new program services to the detriment of cable operators, programmers, and the public. The comments also reveal a general consensus regarding the types of substantive and procedural changes that the Commission should make to correct the deficiencies in its existing rules.

These changes include, first and foremost, revising the methodology for calculating going forward rate adjustments to provide adequate incentives for cable operators to add services to regulated tiers. Time Warner continues to believe that a going forward approach allowing operators to pass through the cost of a new program service plus a mark-up of 25 cents or 25 percent (whichever is greater) offers the most flexibility and, thus, will further the risk sharing partnership between operators and programmers that is responsible for the tremendous growth in cable programming over the past decade. Moreover, there is no reason for the Commission to fear that Time Warner's proposal (or any of the other industry proposals) will result in rate "spikes" for mandatory basic tier customers. There are numerous reasons for operators not to "load up" the basic tier, including technical limitations, copyright costs, and competitive concerns. The Commission should recall that, even in the absence of regulation, cable operators commonly offered low priced basic service, in an effort to attract customers who could then be "sold up" to optional levels. Provisions such as the 30-day notice and free downgrade requirements also protect consumers against "gaming" and diminish the need for the Commission to micromanage system operations through the imposition of "caps" on going forward increases. In any

0event, there is no reason to cap existing or newly created cable programming service tiers or the amount of the pass-through attributable to the cost of the programming.

As part of any revised going forward rules the Commission also must clarify the standards under which a la carte service offerings will be assessed. While the comments on this issue approach it from different perspectives, no one advocates a prohibition against "unbundling" existing services. Time Warner believes that "old" a la carte service offerings should be measured by the two-part test "realistic service option" test enunciated in the April 1993 Report and Order and should not subject to arbitrary limits based on the number of services unbundled from existing tiers. "New" a la carte service offerings also should generally be free of unnecessary limitations which restrict consumer choice. The Commission also should clarify the scope of liability for defective a la carte offerings; establish rules under which operators can "cure" any defects; and reassert exclusive federal jurisdiction over the determination of the status of particular a la carte packages.

The comments reflect widespread agreement regarding procedural changes that are needed to remove disincentives to the addition of new services. These include limiting the review of a rate adjustment to the amount of the adjustment (and not "reopening" previously unchallenged rates); establishing national standards for the application of "negative option" restrictions; and eliminating the regulatory lag in adjusting basic service and equipment rates.

Finally, with respect to the going forward issue, the Commission should give short shrift to the LEC's "regulatory parity" arguments. LEC interstate access charges have no bearing on cable rates and should not effect efforts to improve and simplify the cable going forward rules. In particular, the Commission should not be lured into a review of the LEC's "productivity factor" in this proceeding.

There was also unanimity among commenters, including Time Warner, that the Commission may not and should not regulate rates for cable service provided to commercial establishments. The commenters agreed that the Commission has no legal authority to regulate commercial rates, because the 1992 Cable Act and its legislative history focus exclusively on residential consumers. Similarly, the Commission's "effective competition" definition, which, under the 1992 Cable Act, limits the scope of rate regulation, is based on the Census Bureau's strict definition of "household," which excludes commercial establishments. The Commission cannot simply ignore the plain language of the 1992 Cable Act, its extensive legislative history, the Census Bureau's definitions, and the Commission's own rules and reports, all of which concentrate exclusively on residential households. To do so would clearly be arbitrary and capricious.

Moreover, the three GAO studies upon which Congress relied for its conclusions in the 1992 Cable Act regarding cable rates were limited to residential rates. Thus, the Commission has no information on which it could base any conclusions regarding the reasonableness of commercial rates.

As the commenters noted, commercial rates are reasonable, because they are negotiated freely in the marketplace. Commercial establishment owners are savvy bargainers, and are able to negotiate not only individual rates with cable operators, but also individually tailored service packages. This contrasts sharply with residential subscribers, who must choose from the cable operator's lineup of programming packages at uniform prices.

Many commenters, including Time Warner, also noted that the difference in price between commercial and residential cable service reflects the tremendous difference in value that these subscribers receive. The value of home cable subscription is driven by the content value of the information received; there is no profit motive. On the other hand, commercial subscription is profit driven, its value based on the added business it can bring to the establishment. For example, a sports bar distributes cable programming to paying patrons, many of whom are in the bar primarily because of such cable programming. Obviously, the monetary value of the cable programming to the bar owner is many times the value of that programming to a private residence.

Furthermore, as the commenters noted, cable operators face "effective competition" in the provision of cable service to businesses. This competition comes from home satellite dishes, SMATV and MMDS operators, and other programming packagers, such as the Spectradyne and GuestServe services provided to hotels. There is thus no nexus between commercial and residential rates. Accordingly, there is no reason to regulate commercial rates.

If, however, the Commission decides to regulate commercial rates, such rates must be based on the higher value applicable to commercial customers, rather than the irrelevant residential rate structure. Likewise, the Commission would have to conduct a new survey in order to develop relevant data regarding commercial rates. Additionally, the Commission should not require commercial rates to be uniform, either with each other or with residential rates. Such a requirement would force cable operators to create uniform service offerings to businesses, which businesses do not desire and which cable's competitors need not do. Commercial rates should also not be used to offset residential rates, which have already been lowered twice to levels that the Commission has defined as reasonable. Finally, cities should have the option to regulate commercial rates if the Commission opens such rates to regulation.

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To: The Commission

REPLY COMMENTS OF TIME WARNER CABLE IN RESPONSE TO THE FIFTH NOTICE OF PROPOSED RULEMAKING

Time Warner Cable ("Time Warner"), by its attorneys, hereby submits its Reply Comments in response to the Commission's Fifth Notice of Proposed Rulemaking ("Fifth Notice").[1] Time Warner, a division of Time Warner Entertainment Company, L.P. ("TWE"), operates cable television systems throughout the country.[2]

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[1]Implementation of Rate Regulation Sections of the Cable Television Consumer Protection and Competition Act of 1992, Second Order on Reconsideration, Fourth Report and Order and Fifth Notice of Proposed Rulemaking (hereinafter referenced as "Second Order on Reconsideration" or "Fifth Notice," as appropriate), MM Docket No. 92-266, FCC 94-38, 74 RR 2d 1077 (1994).

[2]TWE is the plaintiff in several lawsuits challenging the validity of various provisions of the 1992 Cable Act and various Commission regulations promulgated pursuant thereto. Nothing herein should be deemed to concede the legality of any provisions subject to any such pending or future legal challenge.

I. GOING FORWARD.

In its initial comments in response to the Fifth Notice, Time Warner identified several significant deficiencies in the Commission's going forward rules and offered specific proposals for changing the rules so as to better achieve the statutory and regulatory goal of allowing cable operators "to grow and develop new facilities and services, including new and innovative regulated program services."[3] The other comments filed in response to the Fifth Notice, particularly those submitted on behalf of programmers, confirm Time Warner's assertion that the Commission's current going forward approach effectively has frozen the introduction of new program services, to the detriment not only of cable operators and programmers, but the public.[4] More significantly, as discussed more fully below, the various cable industry comments reveal a general consensus regarding the types of measures, both substantive and procedural, that the Commission can and should take to correct the flaws in its existing rules.

A. The Commission Should Revise Its Methodology For Calculating Going Forward Rate Adjustments.

The comments in response to the Fifth Notice establish beyond dispute that the Commission's existing going forward rules fail to provide adequate financial incentives for cable operators to add new regulated services. As one commenter stated, the issue is not whether, but how, the Commission's methodology should be modified.[5] Time Warner has

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[3]Second Order on Reconsideration, supra at ¶ 238.

[4]See, e.g., Court TV Comments at 10-11; Liberty Media Comments at 4; NCTA Comments at 3.

[5]See USA Network Comments at 1.

proposed an approach under which operators adding new regulated services could recover the cost of the service plus a mark-up of 25 cents or 25 percent of the service's cost, whichever is greater.[6] Time Warner believes that this approach offers cable operators and programmers flexibility and, thus, will best promote the risk sharing partnership that has produced, over the past decades, enormous growth in the quantity, quality, and diversity of programming available to the American public.

Time Warner's proposal is only one of several suggestions that have been submitted for revising the Commission's going forward rate adjustment methodology. While Time Warner continues to prefer its proposal to any of the alternatives currently before the Commission, it is important to emphasize that none of the proposals will imperil subscribers. In this regard, Time Warner notes that recent trade press reports suggest that the Commission is concerned that the various going forward proposals submitted in response to the Fifth Notice could result in rate "spikes" (i.e., sudden, sharp increases), particularly on the basic tier of service that all subscribers are required to purchase. These concerns, however, are unfounded.[7]

First, many cable systems are technically configured in a way that makes "loading up" the basic tier with additional services (and, thus, driving up the cost of basic) expensive

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[6]Time Warner Comments at 5-6. In its initial comments, Time Warner also proposed that the Commission increase the mark-up on cost increases for existing services from 7.5 percent to 15 percent to ensure that investment is not directed away from existing services. Id. at 6. Other commenters agree that the Commission's rules need to revise the mark-up for existing services and have offered additional suggestions for modifications to the current rules. See, e.g., Lifetime Television Comments at 15; Discovery Communications, Inc. Comments at 9.

[7]"FCC Gridlocked On Key Items," Multichannel News, July 18, 1994, p. 2.

and impracticable.[8] Second, any increase in the price of the basic tier will increase an operator's costs under the cable compulsory license, while adding services to and increasing the rate for a cable programming services tier (on which no broadcast signals are included) has no impact on an operator's copyright costs. Third, and most importantly, competitive pressures and concerns about subscriber satisfaction will deter cable operators from expanding the size and price of the basic tier. If cable operators try to force subscribers to take a growing and increasingly expensive basic tier, subscribers likely will respond by dropping optional services (such as cable programming service tiers or pay services) or by switching to competing distribution technologies such as MMDS, DBS, or C-Band, none of which are obligated to provide subscribers a "basic" service as a prerequisite for reception of other services.

Rather than loading up the mandatory basic tier, it is more likely that operators adding new regulated services will put them on an existing regulated cable programming services tier or create a new regulated tier. Indeed, Time Warner urges the Commission to consider that the common practice of the cable industry <u>prior</u> to regulation was to offer subscribers a relatively low-priced basic tier and "sell up" the subscriber to optional service levels. Moreover, the subscriber is protected by provisions requiring 30 days advance notice and the opportunity to downgrade for free after price changes or retiering.[9] In light of these facts, Time Warner believes that there is no reason to think that operators, absent regulatory

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[8]For example, many systems still utilize traps to secure services offered above the basic level. Expanding the capacity of the basic tier would involve costly truck rolls to replace the traps.

[9]<u>See</u> 47 C.F.R. §§ 76.964, 76.980.

micromanagement by the Commission, will seek to "game" either the basic tier or cable programming services tiers.[10] In particular, Time Warner believes that there is no reason to impose a "cap" on the amount by which regulated rates can be increased to reflect the addition of new services on a going forward basis. If however, the Commission decides to consider a cap, it should limit it to the mandatory basic tier and not apply it to existing or newly created cable programming services tiers.[11]

B. The Commission Should Clarify The Rules Governing The Introduction Of A La Carte Service Offerings.

The comments in response to the Fifth Notice, including those submitted by Time Warner, recognize that the terms and conditions under which cable operators are able to introduce and offer a la carte service options are part and parcel with the "going forward" issue.[12] As Time Warner pointed out, not only did Congress encourage cable operators to "unbundle" their service tiers to give subscribers more choice, but moving established services from a regulated tier to a la carte may be the only way to create room for new services to be introduced.

In its comments regarding the need for clarification regarding the standards for assessing a la carte service offerings, Time Warner distinguished between "old" and "new" a la carte service offerings (i.e., a la carte service offerings introduced before and after March 31, 1994). With respect to "old" a la carte service offerings, Time Warner argued that the

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[10]See also NCTA Comments at 8-9.

[11]Any "cap" on increases also should be limited to the portion of the increase attributable to the mark-up, not the pass-through of the programming cost. See Viacom International Comments at 9.

[12]See, e.g., NCTA Comments at 11-15; Court TV Comments at 16.

Commission should confirm that such service offerings are to be assessed under the two-part "realistic service option" standard announced in the April 1993 Report and Order and that operators will not be penalized for having unbundled services from existing tiers.[13] With respect to "new" a la carte service offerings, Time Warner argued that such service offerings must be affirmatively marketed to the extent they involve services not previously offered on the system.[14] Additional restrictions, such as limitations on the number of services that can be unbundled from an existing tier, are unnecessary and unduly restrict consumer choice. The Commission must not lose sight of the fact that, whenever existing services are moved from a tier to a la carte, cable subscribers have the option of reducing their bills (and the operator's revenues) by electing not to subscribe to one or more of the services. Furthermore, subscribers are protected by the fact that (i) the price of the tier (or tiers) on which the unbundled services previously were carried must be adjusted downward to reflect the deletion of the unbundled services and (ii) subscribers are entitled to advance notice of the unbundling and can elect to downgrade for free for up to 30 days.[15]

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[13]Time Warner Comments at 10-12.

[14]Id. at 8-10.

[15]If the services are "unbundled" from basic, "downgrading" could mean dropping service entirely -- a possibility that will act as a check on cable operator's acting unreasonably. In any event, even where basic tier services are unbundled, the subscriber gains the option of taking less service than was possible previously and saving money as a result. Finally, the Commission should keep in mind that Congress clearly intended for cable operators to have unfettered discretion to add or delete channels from the basic service tier. 47 U.S.C. § 543(b)(7)(B) (services may be added to basic tier at regulated rates). Limits on the ability of an operator to take services from basic and move them to a la carte plainly runs afoul of this statutory provision.

As indicated, numerous commenters agree with Time Warner that the Commission must address a la carte issues as part of its revisions to its going forward rules. While there are differences among various parties as to whether and to what extent unbundling of existing services should be encouraged, no one seriously argues that all unbundling must be prohibited. Moreover, there is a general consensus that the Commission must clarify the scope of liability associated with "defective" a la carte offerings and the extent to which operators can "cure" defects and thus avoid or mitigate their liability. Finally, there is widespread agreement that the assessment of the status of a la carte service offerings must be made at the federal, rather than local, level, given that, on a going forward basis, the status of a la carte service offerings has no bearing on a system's basic service rates and, thus, is outside the local franchising authority's jurisdiction.[16]

C. The Commission Should Remove Procedural Disincentives To The Addition Of New Regulated Services.

Time Warner's initial comments identified three procedural aspects of the Commission's rules that create disincentives to the addition of new regulated services: (i) the reopening of a previously unchallenged rate whenever an adjustment triggers a complaint; (ii) the perceived lack of uniform national standards for determining what constitutes

[16]See TCI Comments at 15; NCTA Comments at 14. One of Time Warner's concerns about local review of a la carte service offerings is the prospect that franchising authorities will attempt to assert jurisdiction over the pricing of premium services, including collective packages of premium services first offered prior to April 1, 1993. The Commission should reaffirm that services offered on a per-channel basis prior to April 1, 1993 are immune from any regulation. See 47 C.F.R. § 76.986(a) ("Collective offerings available on April 1, 1993 shall not be regulated if subsequently offered on the same terms and conditions as were in effect on that date"). Moreover, the Commission should confirm that it was not its intent -- nor could it have been under the 1992 Cable Act -- to freeze the terms and conditions under which unregulated, pre-April 1, 1993 a la carte services are offered.

"negative option" marketing; and (iii) the regulatory lag inherent in the requirement of prior local approval for going forward rate adjustments.[17] Time Warner's views on these issues are echoed by several other commenters.

First, a number of commenters agree with Time Warner that the Commission, in allowing previously unchallenged rates to be reviewed whenever a rate adjustment triggers a complaint, has ignored the clear intent of Congress.[18] In an effort to provide cable operators with a measure of certainty and closure, Section 623(c)(3) of the 1992 Cable Act, 47 U.S.C. § 543(c)(3), specifically limits the filing of complaints regarding non-basic rates to "a reasonable period of time following a change of rates." The Commission's approach completely undermines Congress' will by effectively leaving non-basic rates perpetually open to review. Given the costs and uncertainty associated with the regulatory process, the inevitable result is to deter cable operators from adding new services to regulated tiers. The better position, both as a matter of policy and under the statute, is to limit the review of a rate adjustment to the amount of the adjustment.[19]

Second, it is imperative that the Commission clarify that state and local governments may not, under the guise of consumer protection regulation, impede the addition or deletion

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[17]Time Warner Comments at 15-23.

[18]See, e.g., Providence Journal, et al. Comments at 18; Discovery Comments at 8.

[19]Viacom has suggested that, at the very least, the Commission should modify its rule reopening previously unchallenged rates to exempt systems that have restructured their rates. Viacom Comments at 20. Time Warner believes that where a system's non-basic rates have to date gone unchallenged by any subscriber or franchising authority, those rates should be immune from review, whether or not they were "restructured." In any event, if a restructuring exemption is to be considered, it should be limited to restructuring as of September 1, 1993, since the second phase of the Commission's rules was not announced and did not go into effect until the February 28, 1994 cut-off for initial complaints had expired.

of services to regulated tiers. As the law now stands, state and local governments believe that they have virtually unfettered discretion to characterize a change in a service offering as a "negative option" and require that the service offering be affirmatively remarketed. In its comments, NCTA pointed out that the risk of locally-imposed negative option liability will act as an additional deterrent to the addition of channels to regulated tiers.[20] Moreover, the Commission's clarification should not be limited to situations in which services are added or deleted, but should confirm that, as provided in Section 76.981, the restructuring or division of a tier of previously-delivered services does not trigger an affirmative marketing obligation under federal, state, or local law.[21]

Third, and finally, the Commission must eliminate the regulatory lag inherent in its requirement that local governments give prior approval to any basic rate adjustment. As several commenters point out, the Commission's April 1993 Report and Order indicated that an "automatic" approach to going forward rate increases (subject to 30 days advance notice and subsequent refund liability) was appropriate.[22] In its initial comments, Time Warner described several of the problems created by the requirement of prior local approval, including the risk that fully justified rate increases will be delayed for reasons unrelated to the increase itself (including content-based reasons). The Commission can and should

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[20]NCTA Comments at 10-11.

[21]In its initial comments, Time Warner made reference to the fact that it currently is involved in litigation in Wisconsin relating to the scope of non-federal authority to prohibit actions, such as tier restructuring, expressly permitted by the Commission's rules. Time Warner Comments at Note 40. A copy of a brief regarding this issue recently filed by Time Warner in the Seventh Circuit is attached hereto for the Commission's consideration.

[22]See, e.g., Providence Journal Comments at 16; TCI Comments at 8-10.

ameliorate the risks by providing for automatic rate adjustments for basic service and equipment.[23] In addition, as Time Warner noted in its initial comments, the Commission also should adopt rules under which a local decision denying a going forward rate increase is automatically stayed pending appeal.[24]

D. Local Exchange Carrier Price Cap Issues Are Irrelevant To This Proceeding.

GTE, like other local exchange carriers ("LECs"), persists in trying to persuade the Commission that its regulation of cable rates has some bearing on its regulation of LEC interstate access charges. As Time Warner shows below, GTE's premise is incorrect and its argument is specious. The Commission must not allow LEC parties, who allege that a principle of "regulatory parity" is at stake, to divert it from adopting improved and simplified cable rate regulation.

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[23]With respect to equipment, the Commission generally needs to clarify the schedule for rate adjustments. Time Warner submits that, for equipment whose rates have previously been reviewed by the local government, an annual adjustment approach is appropriate. For new equipment, introduced prior to the annual adjustment, Time Warner believes that operators should be permitted to begin charging for such equipment upon 30 days notice. The rates charged would be subject to review during the next annual adjustment, with refund liability back to the introduction of the equipment. See First Order on Reconsideration, MM Docket No. 92-266 (released Aug. 27, 1993) at ¶ 64 (when new equipment is introduced "a rate may be calculated and used until the annual recalculation is made").

[24]Time Warner Comments at 18. See also Viacom Comments at 16-17. The Commission also should take steps to ensure that local notice provisions do not interfere with the implementation of going forward rate adjustments. For example, a locally imposed 120-day notice requirement for rate increases will completely frustrate the ability of cable operators to make adjustments during the quarter following an external cost increase or decrease. Similarly, Time Warner is aware of local provisions purporting to require a cable operator to delay implementing any rate adjustments until as much as 60 days after the adjustment is approved. The Commission should make clear that such provisions are inconsistent with the federally-mandated rate regulation scheme and are not enforceable.

The parity or "symmetry" argument may have some validity when the Commission is regulating similarly situated firms providing similar services.[25] That is patently not the case here. The Commission could have vastly different schemes for regulating telephone rates and cable rates, and, contrary to GTE's allegation, there would be no impact on consumers. It is important that the Commission have a reasonably consistent method of allocating costs between cable services and telephone services carried on the same facilities.[26] But once costs and revenues are fairly assigned to the respective services, the system of regulating the prices charged to customers need not be the same, or even superficially consistent, for both.

In its Comments, pp. 4 - 6, GTE offers three points in support of its regulatory symmetry argument. The first two are by no stretch of the imagination relevant to this proceeding; the third is relevant but simply incorrect. GTE's pleas for (1) pricing flexibility for LEC access services and (2) elimination of the "sharing" feature of the LEC price cap formula are properly before the Commission in CC Docket No. 94-1, Price Cap Performance Review for Local Exchange Carriers.[27]

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[25]The Commission has consistently found, however, that dissimilar regulation is in the public interest when one firm has the ability and the incentive to exercise market power to the detriment of competition in the relevant market. See, e.g., Competition in the Interstate Interexchange Marketplace, Report and Order, 6 FCC Rcd 5880 (1991), recon., 7 FCC Rcd 2677 (1992).

[26]The Commission could resolve cost allocation and cross-subsidy issues if it takes action on the Petition for Rulemaking of Consumer Federation of America and National Cable Television Association, RM-8221, filed April 8, 1993.

[27]The Commission explicitly placed in issue the sharing question and the pricing flexibility question. See Price Cap Performance Review for Local Exchange Carriers, FCC 94-10, 59 Fed. Peg. 12888, ¶¶ 47-55 & 95-97 (Mar. 18, 1994).

GTE's third contention, that the Commission should eliminate the LECs' "productivity factor" if it decides not to adopt a productivity factor for the cable industry, is not only irrelevant to this proceeding, but also grossly distorts the nature and purpose of a productivity factor. In the original Price Caps proceeding,[28] the Commission decided that the price cap formula for the LECs specifically had to include a productivity factor because of a "substantial body of evidence indicating that the telecommunications industry has historically been more productive that the American economy as a whole."[29] In determining the factor, the Commission was able to rely on very sophisticated studies of LEC productivity covering a 60-year period.[30] The Commission carefully weighed the studies and, based on record evidence, adopted a productivity factor of 3.3 percent.

In contrast, there have never been any productivity studies of the cable industry. GTE's citation to Chairman Hundt's personal view that there should be no productivity factor for cable (GTE Comments, p. 5) reflects nothing more than Chairman Hundt's recognition that there is no record evidence to support imposing a productivity factor on cable. In that observation Chairman Hundt is correct. The Commission has neither a "substantial body of evidence" nor any reputable studies; it has only whole cloth.

Again, and contrary to GTE's assertion, there is nothing at all asymmetrical about applying a productivity factor to one class of regulated firms without applying it to a completely different class of regulated firms. The Commission well knows that a bald

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[28]Policy and Rules Concerning Rates for Dominant Carriers, 5 FCC Rcd 6786 (1990).

[29]Id. at 6796.

[30]Id. at 6796 - 6801 & App. D.

assertion by an interested party such as GTE ("Clearly, cable operators will achieve productivity levels that exceed those of the economy as a whole.") is no basis for on-the-record findings in a rulemaking proceeding.[31] The Commission must ignore GTE's rhetoric in this proceeding in favor of addressing its issues in the proper forum, the Price Cap Review proceeding.

II. COMMERCIAL RATES.

A. Commercial Rates Should Remain Unregulated.

The Fifth Notice seeks comment on whether the Commission should regulate rates for "regulated cable service provided to commercial establishments," whether commercial rates should be used to offset residential rates, and, if the Commission regulates commercial rates, what standards should govern commercial rates. Time Warner agrees with the other commenters who unanimously argued that regulation of commercial rates is neither permitted, nor was it intended, by Congress. Time Warner is unaware of any commenter who agrees that commercial rates should be regulated in any way.

The comments confirm that at no point during the extensive rate regulation deliberation of the 1992 Cable Act did Congress express a concern that commercial rates

[31]GTE advocates a productivity factor for cable predicated on deployment of plant construction that GTE knows has not yet occurred. Compression technology, digital switches, and fiber optic technology, the productivity-related investments cited by GTE, are hardly in use at all in the cable industry, let alone in such widespread use that they could support some forecasts of future productivity gains. In contrast, the Commission chose its LEC productivity factor based on 60 years of historical observations and several meritorious studies placed in the record. GTE simply turns the Commission's reasoned approach on its head. Productivity occurs after the new hardware and software are installed and fully operational, when the marginal cost of adding subscribers and the cost of maintenance decline sharply. It does not occur, as GTE would have it, during the period in which equipment is being installed and employees are being trained to use the new technology.

were unreasonable, were not subject to effective competition, or should be regulated by the Commission.[32] The 1992 Cable Act's legislative history focused exclusively on residential consumers.[33] Further, the three GAO studies upon which Congress relied focused exclusively upon residential rates. Congress simply had no information on commercial rates at the time the Cable Act was debated and passed.[34] Time Warner agrees that without evidence of a Congressional concern over commercial cable rates, the Commission does not possess the legal authority to regulate commercial use.

In fact, the Commission may only regulate rates to the extent provided for under Section 623(a)(1)-(2) of the 1992 Cable Act.[35] Thus, the Commission may regulate only the rates of those systems not subject to effective competition. In accordance with Congressional intent that commercial rates not be regulated, the Commission has adopted a limited "effective competition" standard based on the Census Bureau's definition of "household," which excludes the consideration of commercial use within the community.[36] Rate regulation of commercial use is neither contemplated nor is it compatible with existing regulation of residential rates.

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[32]See Time Warner Comments at 29-30; NCTA Comments at 15-16; CATA Comments at 8; TCI Comments at 35-36; Continental/KBLCOM Comments at 2, 13-15; NHL Comments at 3; Regional Communications Comments at 13.

[33]See H.R. Rep. No. 628 at 30-34; H.R. Conf. Rep. No. 862 at 62-66.

[34]See TCI comments at 38-39.

[35]"No Federal agency or State may regulate the rates for the provision of cable service except to the extent provided under this section and Section 612." 47 U.S.C. § 543(a)(1).

[36]Third Order on Reconsideration, MM Docket 92-266, 74 RR 2d 1274, ¶¶ 3, 15 (1994).

Time Warner agrees with NCTA and other commenters that Congress did not intend to regulate commercial rates, and that according to the Commission's rules, commercial establishments clearly can not be included as "subscribers."[37] If the Commission decided to count businesses as subscribers for purposes of rate regulation, it must also count businesses as subscribers for purposes of the 1992 Cable Act's "effective competition" test.[38] There is no rational basis to treat businesses differently for rate regulation and effective competition purposes.

Regardless, many cable systems face "effective competition" in the provision of service to commercial establishments because of the pervasive presence and penetration of other multichannel video distributors.[39] The healthy SMATV, Home Satellite Dish, and MMDS competition in the provision of video service to commercial establishments was documented by Time Warner and other commenters.[40] Accordingly, Time Warner agrees that the Commission does not have the authority to regulate commercial rates.

B. Commercial Use Must Be Considered Separately From Residential Rates Due To The Added Value Businesses Receive From Cable TV Service.

As numerous commenters stated, the nature of commercial use of multichannel video services, by a restaurant, bar, or other business, is vastly different from the nature of

[37]See Time Warner Comments at 30-32; NCTA Comments at 16; TCI Comments at 33-34; Continental/KBLCOM Comments at 9, 12-13; NHL Comments at 4-5; Regional Comments at 13.

[38]See 47 U.S.C. § 543(l)(1).

[39]See id. at § 543(l)(1)(A).

[40]See Time Warner Comments at 38-40; CVI Comments at 19-22; Continental/KBLCOM Comments at 10-12.

residential use. Home consumption is content driven and value is derived in terms of the actual information absorbed by subscribers. On the other hand, commercial consumption is profit driven, its value derived in terms of the increased business and patronage that video service brings to a business. Unlike residential subscribers, the majority of commercial subscribers are not concerned with the content of the information transferred to them; they are primarily concerned with attracting additional business by offering cable service to their customers.[41]

As several commenters explained, in response to the different value that cable service delivers to commercial users, cable operators package and sell cable services very differently to businesses than to residences. Cable operators typically negotiate individually with businesses over price and number of channels, and must tailor their service offerings specifically to the unique needs of each commercial customer.[42] As a result, the price to each business can vary widely. This is a completely different framework than provision of cable service to residents, who must choose from the cable operator's established lineup of programming packages and who must be charged uniform prices. This process highlights not only commercial customers' increased bargaining power,[43] but also the extra costs in providing commercial service, which cable operators have the right to recover.[44]

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[41]See Time Warner Comments at 34-35; TCI Comments at 34; CVI Comments at 17-22; Rainbow Comments at 3-5.

[42]See Time Warner Comments at 36-38; CVI Comments at 17; Pagosa Comments at 3-5; NHL Comments at 3-5.

[43]See Time Warner Comments at 38; CVI Comments at 20; NHL Comments at 3-5.

[44]See 47 U.S.C. § 543(b)(2)(C).

Since both the content and the bargaining over price of cable programming is vastly different for commercial users than for residences (and differs widely even among commercial users), Time Warner agrees fully with other commenters that it makes no sense to use residential cable rates as a model to regulate commercial cable rates, or, for that matter, to regulate commercial cable rates at all.[45]

C. If The Commission Determines That It Should Regulate Commercial Rates, Commercial Rate Regulation Should Be On A Basis Independent From Residential Rate Regulation.

If commercial rates are to be regulated at all, the Commission must take into account the different price/value and demand factors applicable to commercial customers rather than blindly apply its residential cable rate structure.

First, commercial rates, even if regulated, should reflect the value conferred upon the particular commercial user. Because of business profits earned from the reception of cable programming, the value of video services to most commercial users is many times what a cable provider could recover through rates based on residential use.[46] A truly reasonable rate level for such commercial users would be one that reflects the value in increased profits that commercial users achieve from receipt of the service. In fact, such reasonable rates are currently achieved in the unregulated marketplace, where, as explained above, provision of

[45] See Time Warner Comments at 40; NCTA Comments at 17-19; CVI Comments at 16-18; Rainbow Comments at 3-5; Providence Journal Comments at 11-12; NHL Comments at 3-5.

[46] See Time Warner Comments at 41-42; TCI Comments at 34; CVI Comments at 17-22; Rainbow Comments at 3-5.

cable service to businesses faces effective competition and savvy bargaining parties.[47] To allow commercial users to obtain service at prices dramatically below the true value of the service to those users provides an unreasonable windfall to commercial users. While it may be within the purposes of the Act to reduce residential rates, it does not automatically follow that commercial rates must likewise be reduced.

Second, the FCC's current benchmark methodology was not designed to apply to commercial rates and the customized programming packages often supplied to commercial accounts. The Commission's rate survey used to derive the benchmark tables collected information regarding cable operator's "basic" and "tier" levels of service regularly provided to residential customers; the survey contained no schedules for collection of data regarding commercial rates. Time Warner agrees with NCTA and other commenters that the Commission lacks adequate information in its benchmark survey from which to conclude that an operator's commercial rates are "not reasonable."[48] Before the Commission decides to regulate commercial rates, it must conduct a new survey in order to develop relevant data.

Third, whether or not commercial rates are regulated, they need not be uniform. When Congress adopted the uniform rate requirement, its purpose was to ensure that all residential subscribers within a given franchise area received uniform rates. Congress evidenced no intent to include commercial subscribers in its uniformity requirement. In light of the diversity of needs and uses of commercial subscribers, uniform commercial rates

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[47]See Time Warner Comments at 36-40; NCTA Comments at 17-19; CVI Comments at 16-22; Continental/KBLCOM Comments at 10-12.

[48]See Time Warner Comments at 42-43; NCTA Comments at 18; TCI Comments at 39-40; Regional Comments at 13-14.